UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD [1]

REGION 20

US PROTECT CORPORATION

Employer

and Case 20-UD-442

MICHAEL LESSARD

Petitioner

and

CALIFORNIA SECURITY OFFICERS UNION

Union

SUPPLEMENTAL DECISION ON CHALLENGED BALLOTS AND OBJECTION

On October 25, 2005, I directed that an election be conducted in this matter using mail ballots.[2] On November 2, I revised that direction only as to the dates for the mailing and return of the ballots. Accordingly, this office mailed a ballot to each voter on the eligibility list on November 14, with a deadline of 5:00 p.m. on November 28 for receipt in the Regional Office of all votes. The following appropriate collective-bargaining unit comprises the employees who were eligible to vote in the election:

> All full-time and regular part-time armed and unarmed security officers employed by the Employer at General Services Administration (GSA) locations in California counties of San Francisco, Marin, Sonoma, Napa, Solano, Contra Costa, Alameda, Santa Clara, San Mateo, Santa Cruz, San Benito, and Monterey, excluding office clericals, managerial personnel, confidential personnel, supervisors as defined in the National Labor Relations Act, and all other personnel.

1 Herein also referred to as the Board.

2 All dates refer to 2005 unless otherwise noted.

Ballots were commingled and counted in the Regional Office on February 27, 2006. The Tally of Ballots served upon the Parties at the conclusion of the election shows:

Approximate number of eligible voters 182
Number of Void ballots 4 Number of Votes cast in favor of withdrawing the authority of the bargaining repr
Number of Votes cast against the above proposition 16
Number of Valid votes counted 75
Number of Challenged ballots .76 Number of Valid votes counted plus challenged ballots . . . 151

The challenged ballots were sufficient in number to affect the results of the election. Additionally, on March 6, 2006, the Union timely filed a document entitled "The Union's Objections to Conduct of Election and Counting of Ballots," a copy of which has been served upon both Employer and Petitioner. The results of my investigation, my findings and my decisions follow:

Challenged Ballots

For purposes of analysis, I have divided the challenged ballots into several categories. *Group A:* The Union challenged ballots cast by the following 20 individuals on the alleged ground that they lacked a community of interest with eligible voters:

Aaron Applewhite, Mario Ayala, Mekonnen Balke, Keith Chung, Ferdinand Francisco, Bernard Garcia, Abdul Wassi Ibrahim, Michael Lessard, Greg Manaig, Rosco Miller, Konstantinos Moshogiannis, Fidelis Piano, Johnny Ramirez, Liberato Raymundo, Felix Reclosado, Tom St. Germaine, Spencer Sisavat, Angelo Soriano, Ricardo Veluz, and **I Kuan Wong**

Pursuant to my Direction of Election, the eligibility cutoff date by which employees had to be on the Employer's payroll was October 16. The names of these 20 individuals

appear on the eligibility list that the Employer submitted on the basis of that criterion. The Union does not assert that these individuals were not on the Employer's payroll as of October 16, but rather that they should not have been.

In this regard, the Union claims that on various dates between January 13 and April 25, it requested that the Employer terminate each of these employees because he or she had failed to meet the requirements of the union-security provision of the collectivebargaining agreement. When the Employer refused to terminate the employees, the Union filed an unfair labor practice charge in Case 20-CA-23326. Region 20's investigation of that charge led to issuance of a complaint alleging that the Employer had indeed unlawfully refused to honor the Union's request to discharge employees who were delinquent.

Subsequently, however, the Region's investigation of a charge against the Union in Case 20-CB-12410 persuaded me that the Union had acted arbitrarily in attempting to enforce the union security clause. I withdrew the complaint and dismissed the charge in Case 20-CA-23326,[3] and issued complaint in Case 20-CB-12410. The Union entered into an informal Settlement Agreement to resolve the latter case, and in compliance with its commitment in that matter, by letter dated March 26, 2006, informed the Employer and the named employees that it had rescinded its demands between January 14 and April 25 that the Employer terminate them.

In these circumstances, the Union's argument that the above-named employees were ineligible to vote because the Employer should have terminated them prior to the election because of their dues delinquencies simply carries no weight. Until a union properly invokes an employer's contractual commitment to terminate an employee due to the employee's failure to abide by his or her obligations under the union security clause, such an arrearage does not affect the individual's status as an employee. The Union's withdrawal of its January 14 – April 25 requests for terminations removes any

3 The Office of Appeals denied the Union's appeal of the dismissal on December 8. The Union requested reconsideration, and on January 12, 2006, the Office of Appeals declined to reopen the matter.

dues-related cloud over the employment status of the employees named above that might have existed prior to April 25.

In support of its argument, the Union also argues that I should find that these, and other employees addressed below who were delinquent in their dues, forfeited their eligibility to vote because of their consistent refusal to comply with their obligations under union security provision of contract. The Union notes that the Board excused a union's failure to give adequate notice about a dues delinquency to a "free rider" who had calculatedly attempted to evade his obligation under union security, on the basis that it would be inequitable to permit the delinquent to escape from the employment-related consequences of his deliberate disregard for his contractual responsibility.[4] The Union analogizes that it is unfair that employees who benefited from the fruits of some provisions of the contract that the Union purportedly gained should be allowed to ignore the provision of the contract that provides for the Union's revenue, yet retain their eligibility then to vote to deauthorize the provision that they have repeatedly flouted.

That situation, where the Board deemed the delinquent employee to have forfeited his protection under Section 8(b)(2), seems distinguishable to me from the instant matter. Here, the Union failed to test the Employer's readiness to abide by the termination consequence provided in the union security clause by failing, under law and/or the collective-bargaining agreement, to perfect its requests. In short, the Union's failure of execution cost it the opportunity to cause the Employer to remove delinquent employees from the payroll and render them ineligible to vote. Absent case law to the contrary, which the Union concedes that it cannot offer, I do not believe that I have a basis to deem delinquent employees to have forfeited their eligibility to vote

In sum, the Employer represents that it employed these 20 individuals in the bargaining unit as of the eligibility cutoff date and on the deadline to submit votes, and there is no argument, much less evidence, to the contrary. Accordingly, I find that they were eligible to vote and direct that their ballots be opened and counted.

4 *Produce Workers Local 630 (Ralph's Grocery Co.)* , 209 NLRB 117 (1974).

Group B: As with the preceding group, the Union challenged the ballots cast by the following 36 individuals on the alleged ground that they too lacked a community of interest with eligible voters.

> **Elias Abdullah(i), Johnny Arcibal, Nabeel Assana, Dawud Barber, Kuljit Bedwal, Arron Bell, Theodore Brooker, Lawrence Brown, Pantaleon Calisa, Samuel Castillo, Bounsong Chittharath, Clifton Dergan,Terrence Foskey, Edgardo Garcia, Nino Gagelonia, Narciso Gutierrez, Antwon Hegler, Karen Humphrey, Gregory Johns, Jong Lee, Peter Len, William Len, Shigenobu Lloyd, Jonathan Montejo, Hien Nguyen, Travis Palatvong, Clyde Perkins, Artemio Plata, Junichi Porkola, Ghulam Raza, Michael Reed, Bhavnish Singh,[5] Chuay Sisavat, Iosefa To'o, Lonnie Vinson,** and **Windsor Young-Hunter**

The Union requested that the Employer terminate these employees for dues delinquencies by letters dated October 21 or November 11.[6] The Employer declined to comply with the Union's requests, and the Union filed an unfair labor practice charge in Case 20-CA-32779 alleging that the Employer's refusal violated the Act. Investigation of the charge disclosed that in response to the Union's letters, the Employer had reasonably sought additional documentation from the Union, including the contractuallyspecified proof of receipt by employees of the Union's notices of arrearages. Because the Union failed to provide to the Employer the requested documentation, I dismissed this charge on December 28.[7]

Thus, as with the individuals in Group A, the Employer represents that it employed the individuals in Group B, whom it listed on the eligibility list, in the bargaining unit on both the eligibility cutoff date and on the deadline to submit ballots. The Union has not provided evidence or even argued to the contrary. In these circumstances, I find that

5 As an alternative basis for its challenge to Singh, the Union posited that he might have been terminated prior to the eligibility cutoff date. The Employer's payroll information, however, showed that it employed Singh in the bargaining unit on both the eligibility cutoff date and on the deadline to return ballots.
6 For reasons unclear, in the latter letter the Union rescinded its request regarding six employees, including challenged voters Clyde Perkins and Junichi Porkola.
7 The Union requested an extension of time to request review of the dismissal, but ultimately did not appeal.

the 36 individuals in Group B were eligible to vote, and direct that their ballots be opened and counted.

Group C: The Union also challenged the ballots of **Dennis Carter, Edito Omapas** and **Carlos Quezada** on the alleged ground that these three individuals lacked a community of interest with eligible voters. Apparently the Union believes that it requested Carter's termination. Although asked, it did not specify when, and offered no other explanation for that challenge. It submitted that it had requested that the Employer terminate Quezada and Omapas for dues delinquencies on January 18, 2006 and February 8, 2006, respectively, well after the election but in advance of the tally. Thus, as above, there is neither argument nor evidence that the Employer did not employ these individuals, whose names appeared on the eligibility list, in the bargaining unit, on both the eligibility cutoff date and on the deadline to vote. Accordingly, I find that these three employees were eligible to vote, and direct that their ballots be opened and counted.

Group D: The Union challenged the ballots of **Guillermo Aynaga, Simeon Cangco, John Fleming, William Johnson, Mohammed Joiyah, Fazal Karimi, Adam Torres, Romeo Torres** and **Shahyar Zahedi** because it stated that it had no information about their employment status. The Employer subsequently provided payroll records and other information to document that it employed all of these individuals, in the bargaining unit, from the eligibility cutoff date through the final date to submit a completed ballot.[8] Consequently, I find that these nine employees were eligible to vote, and that their ballots will be opened and counted.

Group E: The Union challenged the ballots of **Darrell Bryant, Arthur Clayborn, Oscar Gomez-Hernandez** and **Michael Sabra** on the basis that they arrived in the Regional Office after the deadline, i.e. close of business on November 28, for their timely receipt. Although the ballots did in fact arrive after the deadline, the ballots were received in the Region before the count began on February 27, 2006. The Board has held that even

[8] Of the nine, only Cangco had a break in employment since being hired, but because that occurred between December 24, 2005 and March 10, 2006, it did not affect his eligibility to vote in the election.

where the record does not disclose a reason for the late mailing of a ballot that arrives after the deadline for receipt, the ballot should be counted so long as it is in hand before the tally begins.[9] The investigation disclosed that the Employer employed Bryant, Clayborn, Gomez-Hernandez and Sabra in the bargaining unit as of the eligibility cutoff date and on the deadline to submit ballots, and that it employed them still when ballots were tallied on February 27. In these circumstances, the late submission of their ballots provides no basis to exclude them. I find that these four employees were eligible to vote, and direct that their ballots be opened and counted.

Group F: The Union challenged the ballots cast by **Reyna Rodriguez, Jack Thomas** and **Komi Touglo** on the ground that they had tendered their ballots late, and added that Touglo lacked a community of interest with eligible voters. It also challenged the ballot of **James Turner** on the grounds that he lacked a community of interest with employees and might have been terminated. On the basis of case law noted with regard to the preceding group, the lateness of the ballots of Rodriguez, Thomas and Touglo does not render them void. The investigation disclosed, however, that the Employer promoted them on October 1, in advance of the eligibility cutoff date, to positions outside the bargaining unit. The investigation further revealed that Turner's employment in the unit ended on November 20, prior to the deadline to submit completed ballots. Accordingly, I find that these four individuals are ineligible to vote, and their ballots will not be opened and counted.

Objection(s)

In the opening paragraph, the Union's *Objections* state,

> Specifically, it is the Union's position that in the unusual circumstances of this case the UD Petition should be dismissed, without prejudice to

9 *American Driver Service,* 300 NLRB 754 (1990); *Kerrville Bus Co.,* 257 NLRB 176 at 177 (1981).

> Petitioner's right to file a new petition following the final disposition of the pending unfair labor practice charges involving the same parties.[10]

Essentially, the Union objects to the election on the alleged basis that the Employer eliminated the possibility for a fair election by openly and persistently refusing to comply with the union security agreement throughout the term of the Parties' collective bargaining agreement.[11] In particular, the Union asserts that the Employer has repeatedly violated the Act by refusing to discharge delinquent employees since approximately January, when the Union first started trying to enforce the union security provision.[12] The Union contends that the Employer's conduct has unfairly given the large number of delinquent employees the motive to deauthorize the union security provision from the contract, in order to protect them against liability for their past delinquencies.

Analysis: The Union's arguments in this regard parallel its assertions discussed above regarding delinquent dues paying employees' alleged lack of community of interest with other employees. As I noted earlier, the test for eligibility to vote is not complex. An individual need only have been an employee in the bargaining unit as of October 16 and November 28, the eligibility cutoff date and deadline to submit the completed ballot to the Regional Office, respectively. Although the union security clause in the collectivebargaining agreement compels the Employer to terminate, upon the Union's request, employees who have failed to meet their obligation to pay regular dues and initiation fees, it also levies certain procedural requirements upon the Union. Moreover, extant law obliges the Union to administer the dues requirement in a non-arbitrary and even-handed manner.

10 Rather than recite the Union's objection(s) verbatim, I have chosen to attach its four-page *Objections* document in its entirety, because the Union did not enumerate, summarize or specify its objection(s).

11 The term of the collective-bargaining agreement is from September 3, 2003 through August 31, 2006.

12 The Union explained that it delayed enforcement efforts because of an earlier UD election conducted in the unit in 32-UD-209. The Tally of Ballots in that matter issued on May 14, 2004, and showed that of approximately 164 eligible voters, 73 had voted to deauthorize and 25 had voted against. Because a majority of the eligible voters had not voted in favor of deauthorization, the union security clause in the contract survived.

The Union's argument that unfair labor practice allegations take precedence over the Petition, and compel its dismissal in the meantime, does not withstand scrutiny. A review of the numerous charges, countercharges and third-party charges involving the Employer and Union since January shows that only two of the charges remain open.

As noted above, the Union's charge in Case 20-CA-32326 involved the Employer's alleged refusal to honor the Union's requests between January 14 and April 25 to terminate delinquent employees. I dismissed that charge on the basis that the Union's arbitrary application of union security against employees fatally flawed its attempt to enforce the provision. The Union's appeal of the dismissal was denied.

The next material charge against the Employer, in Case 20-CA-32779, leveled like allegations that stemmed from the Union's request for terminations in October and November. I dismissed that charge because of the Union's failure to provide the Employer with information that the Employer reasonably requested under law and the terms of the contract to satisfy itself that the terminations would be legitimate. The Union did not appeal the dismissal.

Case 20-CB-12410 contains the sole unclosed charge that deals with pre-election conduct. As noted earlier, an informal settlement agreement resolved allegations that the Union had improperly sought to enforce the union security clause. On March 26, 2006, the Union fulfilled its final affirmative compliance requirement pursuant to the settlement when it notified the Employer and affected employees that it had rescinded its January – April requests for their termination because of dues delinquencies. I anticipate that the case will close shortly on compliance.

Other than Case 20-CB-12410, the only charge involving the Parties that awaits disposition underlies Case 20-CA-32864, which once again raises the allegation that the Employer refused to abide by the termination requirement in the union security clause.[13]

[13] The reference in the *Objections* to charges, in the plural, presumably was based on the pendency at that point of like charges in Cases 20-CA-32882, -32892 and –32898. On March 27, 2006, I approved the Union's request to withdraw those three charges.

This case involves the Union's request on or after January 18, 2006 that the Employer terminate 15 employees for dues delinquencies, 13 of whom cast challenged ballots. Consequently, it has no implications whatsoever for the eligibility of employees who had to submit their ballots by November 28. Furthermore, I believe that if resolution of the instant election shows that a majority of eligible employees voted to deauthorize the union security provision, the effect of same will be retroactive to November 28, and the Union's requests for delinquency-based terminations after that date will be moot.[14] Therefore, on March 20, 2006, I placed Case 20-CA-32864 in abeyance, and I do not intend to process it further until a certification has issued in the instant matter.

I noted above that, with regard to certain of the challenged ballots, no cloud hovers over the status, and hence eligibility to vote, of any employee because of a dues arrearage that preceded the deadline to submit votes in this matter. Similarly, the evidence does not establish that the Employer committed an unfair labor practice, with regard to the union security clause or any other matter that might have precluded a fair election. Indeed, the only unremedied unfair labor practice allegations involving the Employer and Union found thus far to have merit arise from the charge in 20-CB-12410 against the Union. That case provides no basis to block proceeding in this matter. Similarly, I find no evidence that the Employer engaged in conduct during the critical period[15] that interfered with employees' freedom of choice in this matter. Accordingly, I overrule the Union's *Objections.*

Summary

14 In *Lyons Apparel, Inc.,* 218 NLRB 1172 (1975), the Board addressed enforcement of a union security clause only as it applied to new employees who had commenced employment following a UD election but prior to resolution of post-election issues and the ultimate issuance of the corresponding certification. It appears, however, that the principle of retroactivity would also apply to continuing employees in a situation such as this.

15 The critical period began with the filing of the Petition on April 22.

I have found that no material or substantial issues of fact exist regarding the determinative challenged ballots or the Union's *Objections.* For the reasons stated above, I direct that the challenged ballots cast by : **Elias Abdullah(i), Aaron Applewhite, Johnny Arcibal, Nabeel Assana, Mario Ayala, Guillermo Aynaga, Mekonnen Balke, Dawud Barber, Kuljit Bedwal, Arron Bell, Theodore Brooker, Lawrence Brown, Darrell Bryant, Pantaleon Calisa, Simeon Cangco, Dennis Carter, Samuel Castillo, Bounsong Chittharath, Keith Chung, Arthur Clayborn, Clifton Dergan, John Fleming, Terrence Foskey, Ferdinand Francisco, Bernard Garcia, Edgardo Garcia, Nino Gagelonia, Oscar Gomez-Hernandez, Narciso Gutierrez, Antwon Hegler, Karen Humphrey, Abdul Wassi Ibrahim, Gregory Johns, William Johnson, Mohammed Joiyah, Fazal Karimi, Jong Lee, Peter Len, William Len, Michael Lessard, Shigenobu Lloyd, Greg Manaig, Rosco Miller, Jonathan Montejo, Konstantinos Moshogiannis, Hien Nguyen, Edito Omapas, Travis Palatvong, Clyde Perkins, Fidelis Piano, Artemio Plata, Junichi Porkola, Carlos Quezada, Johnny Ramirez, Liberato Raymundo, Ghulam Raza, Felix Reclosado, Michael Reed, Michael Sabra, Tom St. Germaine, Bhavnish Singh, Chuay Sisavat, Spencer Sisavat, Angelo Soriano, Iosefa To'o, Adam Torres, Romeo Torres, Ricardo Veluz, Lonnie Vinson, I Kuan Wong, Windsor YoungHunter** and **Shahyar Zahedi** be opened, intermingled and counted. I sustained the challenges to the ballots cast by **Reyna Rodriguez, Jack Thomas, Komi Touglo** and **James Turner,** albeit not necessarily on the basis posited by the Union. Because Rodriguez, Thomas, Touglo and Turner were not eligible to vote, I direct that their votes not be counted. Finally, I direct that a revised tally of ballots and corresponding certification issue and be served upon the Parties following the count.

DATED AT San Francisco, California, this 7th day of April 2006.[16]

16 Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Decision may be filed with the Board in Washington, D.C., within 14 days. Exceptions thus must be received by the Board in Washington by April 21, 2006. Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which a party files with the Board. Failure to append to the submission to the Board a copy of evidence timely

/s/ Joseph P. Norelli _____

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submitted to the Regional director and not included in the report shall preclude the party from relying upon that evidence in any subsequent related unfair labor practice proceeding.